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Washington Letter

November 9, 1962

LEGAL BASIS FOR THE QUARANTINE OF CUBA

This is a special issue of the Washington Letter to inform leaders of the Bar of the international legal aspects of the quarantine against Cuba. The following statement reflects the line of analysis of the Office of the Legal Adviser, Department of State.

The quarantine against shipments of offensive weapons to Cuba has been imposed by the United States pursuant to a Presidential Proclamation and in accordance with a recommendation of the Organ of Consultation established by the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).

The President imposed the quarantine under his constitutional powers, as Commander-in-Chief of the Armed Forces, to protect the national security. He acted upon a finding that "the peace of the world and the security of the United States and of all American States are endangered by reason of the establishment by the Sino-Soviet powers of an offensive military capability in Cuba, including bases for ballistic missiles with a potential range covering most of North and South America."

At international law, the fundamental source of authority for the action was the Rio Treaty, setting up a regional organization to guard the hemisphere against threats to the peace, and as such sanctioned by the United Nations Charter.

Rio Treaty. On October 23 the Council of the OAS met and, in accordance with Article 12 of the Rio Treaty, constituted itself as an Organ of Consultation. After considering the evidence of the secret introduction of Soviet strategic nuclear missiles into Cuba, it concluded that there was a situation that might endanger the peace of America. To meet this threat, it adopted a resolution recommending that Member States "take all measures, individually and collectively, including the use of armed force, which they may deem necessary to insure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent"

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The recommendation that Member States use armed force if necessary was authorized by the terms of the Rio Treaty and adopted in accordance with its procedures.

The Rio Treaty, together with related agreements, constitute the Inter-American system. That Treaty provides for collective action, both in case of armed attack and in case any American State is threatened "by an aggression which is not an armed attack . . . or by any other fact or situation that might endanger the peace of America." In such cases, the American Republics act through the Organ of Consultation, which is comprised of Foreign Ministers or representatives specifically designated for the purpose. Article 8 of the Treaty lists the measures which may be taken by the Organ of Consultation to meet a threat to the peace of America. This list specifically includes "use of armed force".

The action of the OAS in recommending a quarantine falls readily within the framework of the authority and procedures prescribed by the Treaty. Cuba, as a signatory of the Rio Treaty, accepted that authority and assented to those procedures.

United Nations Charter. The Charter assigns to regional organizations an important role in carrying out the purposes of the United Nations. Article 52(1) specifically contemplates the use of "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action,"

The importance of regional agencies in the maintenance of peace and security was recognized in the earliest conceptions of the United Nations. Moreover, Article 52 and the other Charter provisions dealing with regional organizations were developed at San Francisco with the Inter-American system specifically in mind.

The delegate of the United States, Senator Arthur Vandenberg, stated at San Francisco, "In my view we have infinitely strengthened the world organization by thus enlisting within its overall supervision, the dynamic resources of these regional affinities."

The Charter limits the activities of regional organizations by providing, in Article 52(1), that such activities must be "consistent with the Purposes and Principles of the United Nations." The Rio Treaty plainly meets this requirement. It was enacted by the signatories "to improve the procedure for the pacific settlement of their controversies," in full accord with Article 52(2). The signatories expressly reiterated "their will to remain united in an Inter-American system consistent with the purposes and principles of the United Nations." The Resolution and its implementation are also in accordance with the Charter's purposes and principles. The recommended measures are designed, in the opening words of the Charter, "to maintain international peace". They represent "effective collective measures for the prevention and removal of threats to the peace." Article 1(1).

The quarantine measures authorized by the OAS are not "enforcement action" requiring Security Council authorization under Article 53 of the Charter. In the past, OAS sanctions against the Trujillo regime and Cuba have not been so regarded, even though they were binding on the Member States. The present OAS resolution is recommendatory on its face; indeed the OAS cannot require a State to use force without its consent (Article 20). Recommendatory measures of this character, even though they may involve the use of force, cannot, as the World Court said in the recent advisory opinion on United Nations assessments, be considered "enforcement action."

Finally, the quarantine measures are consistent with Article 2(4) of the Charter, which directs Members to refrain from the threat or use of force "against territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of

the United Nations." The quarantine, a regional action under Chapter VIII to meet a threat to peace and security, is not a threat or use of force inconsistent with the purposes of the United Nations. The secret introduction of nuclear missiles into Cuba constituted a threat of force in violation of Article 2(4), not the quarantine designed to deal with it.

"Quarantine" v. "Blockade" - It would be foolish to deny the analogy between the measures taken and the traditional blockade. Both may involve the interruption of maritime commerce through the use of naval forces. But the differences are significant. The quarantine which we have imposed is selective. It is directed at the shipment of specialized strategic weapons, which is a far cry from ordinary maritime commerce. It is designed to deal with a threat to the peace, found to be such by the international organization having jurisdiction in the premises and in accordance with powers and procedures laid down in a treaty to which Cuba is a party. By contrast, blockade has traditionally been an operation carried out in wartime by a belligerent in an effort to crush the economy of his enemy.

INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE

Signed at Rio de Janeiro, September 2, 1947

Article 6

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

Article 8

For the purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications; and use of armed force.

Article 11

The consultations to which this Treaty refers shall be carried out by means of the Meetings of Ministers of Foreign Affairs of the American Republics which have ratified the Treaty, or in the manner or by the organ which in the future may be agreed upon.

Article 12

The Governing Board of the Pan American Union may act provisionally as an organ of consultation until the meeting of the Organ of Consultation referred to in the preceding Article takes place.

Article 20

Decisions which require the application of the measures specified in Article 8 shall be binding upon all the Signatory States which have ratified this Treaty, with the sole exception that no State shall be required to use armed force without its consent.

UNITED NATIONS CHARTER

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; * * *

Article 2

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.